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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 256

WILLIAM T. McCLUSKEY, JR.,

Petitioner

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968
No.

WILLIAM T. McCLUSKEY, JR.,
Petitioner,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner herein, William T. McCluskey, Jr., prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on March 21, 1969, denying rehearing on the judgment of February 21, 1969, affirming the order of the United States District Court for the Northern District of Ohio, Western Division, which dismissed the complaint herein upon the respondent's motion for a directed verdict.

OPINION BELOW

The per curiam decision of the United States Court of Appeals for the Sixth Circuit (Appendix A, infra. pp.11-14)is unreported. The order denying rehearing on March 21, 1969, is attached as Appendix B, infra. p. 15.

JURISDICTION

In this case, federal jurisdiction is based solely upon diversity of citizenship. The governing law is that of Ohio where the petitioner was seriously injured as the result of the truck which he was operating being struck by the respondent's railroad train at a grade crossing in Ottawa County, Ohio. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Rule 19 of this Court which provides for a review on a writ of certiorari "Where a court of appeals *** has decided an important state or territorial question in a way in conflict with applicable state or territorial law".

QUESTIONS PRESENTED

1. Where the evidence shows that the petitioner, who was operating a motor truck upon a public highway across a three track grade crossing and who stopped, looked and listened before going upon the grade crossing, but was unable to hear respondent's train, which was approaching the crossing at an acute angle of 29°, because it did not blow its horn or whistle, and was unable to see respondent's approaching train because seventeen empty freight cars were parked for repairs on the south storage track at a point commencing 390 feet east of the centerline of the highway, and then was proceeding forward in "creeper gear" at approximately one and one-half miles per hour when struck by the train, is the decision of the Court of Appeals affirming a directed verdict for the respondent on the ground that petitioner was guilty of contributory negligence as a matter of law in conflict with applicable Ohio law?
2. Under the circumstances set forth in the foregoing question, is the petitioner, who as the proximate result of injuries and disabilities suffered is permanently paralyzed, deprived of his life and liberty contrary to the Fifth Amendment to the Constitution of the United States by a directed verdict by a federal judge that he was guilty of contributory negligence as a matter of law?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This is a personal injury action arising out of a grade crossing collision between the respondent's train and a truck operated by the petitioner at a grade crossing in Ottawa County, Ohio, on June 7, 1965. The action was filed in the United States District Court for the Northern District of Ohio, Western Division, jurisdiction being based upon diversity of citizenship and a prayer in excess of $10,000. Neither party demanded a jury.

At the close of the petitioner's case, respondent moved for a directed verdict. The trial court found that the petitioner's evidence was insufficient as a matter of law to establish wanton and willful misconduct on the part of the respondent, but that the evidence was sufficient to establish the negligence of the respondent, and that the evidence established that the petitioner was guilty of contributory negligence, which negligence proximately contributed to the injuries complained of and, therefore, directed a verdict in favor of the respondent. Thereupon, judgment was given for the respondent and the complaint was dismissed with prejudice at the petitioner's costs (Appendix C, p. 16). On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment of the trial court was affirmed.

The grade crossing collision occurred on June 7, 1965, at approximately 5:45 P.M. at the intersection of State Route 590, which runs in a generally northerly and southerly direction, and the respondent's railroad tracks running in a

generally northwesterly and southeasterly direction. The three railroad tracks cross State Route 590 at grade at an acute angle of 29° between the highway and the railroad tracks. The southerly most track is called the storage track, the middle track is referred to as the main or through track, and the northerly track is the so-called passing track.

On the afternoon in question, seventeen "bad order freight cars" were stored southeast of the intersection on the storage track beginning at a point 390 feet east of the centerline of the highway. The respondent's train came from the east travelling on the center or through track.

On the day of the collision the petitioner was driving a Variety Club Beverage Company motor truck loaded with 200 cases of soft drinks which required him to pass over the rough crossing at this location in "creeper gear" at approximately a mile and a half per hour. Petitioner's truck stopped before crossing the through track. It "drifted back" a few feet and then started forward in "creeper gear".

The record establishes by the admissions of the respondent's employees that the petitioner brought the truck, which he was operating, to a full stop before proceeding toward the through track at which the collision occurred. At this exact instant, the approaching train was 800 feet southeast of the petitioner. At that time, the petitioner looked and listened. In this stopped position, it was physically impossible for the petitioner to see the approaching train. The undisputed testimony of Dr. Blackwell, an ophthalmologist, was that the respondent's train was not a "discernible object" until the train was within 750 feet of the crossing. This is because the approaching train blended into the long line of railroad cars parked on the southmost storage track beginning at a point only 390 feet east of the grade crossing.

The respondent's employees testified that the motor truck operated by the petitioner was observable by them when the train was approximately 1500 feet southeast of the crossing. The train approached the crossing at a speed of forty-five miles per hour covering sixty-six feet per second. Mr. Materni, one of respondent's employees, testified that the train was

800 feet from the crossing when the motor truck stopped; that the truck "drifted back" a few feet and then started forward, at which time the train was then 600 feet from the crossing.

The petitioner brought his truck to a stop with the cab of the truck over the southmost storage track. The front bumper of the truck extended north of the storage track a distance of approximately three feet. The overhang of the train was between two and a half and three feet. The southmost rail of the through track and the northmost rail of the storage track were eight and one-half feet apart.

As the direct consequence of the collision, the petitioner, who was then twenty-one years of age, suffered a compression fracture of the fourth thoracic vertebra, a disruption of his spinal continuity at the level of the fourth thoracic vertebra. He has been rendered permanently paralyzed from this level of his body downward and for all intents and purposes he will be confined to a wheelchair for the remainder of his natural life. The petitioner also suffers from retrograde amnesia as a result of the collision, and consequently, remembers nothing about the events of the day of June 7, 1965.

REASONS FOR GRANTING THE WRIT

Under Ohio law, which is controlling here, upon a motion to direct a verdict the party against whom the motion is made is entitled to have the evidence construed most strongly in his favor. *Wilkeson v. Erskine & Son, Inc.*, 145 Ohio St. 218, 61 N.E. (2d) 201. If, upon any essential issue, after giving the evidence such favorable construction, reasonable minds can come to but one conclusion and that conclusion is adverse to such party, the judge should direct a verdict against him. *Hamden Lodge No. 517, Independent Order of Odd Fellows, et al., v. The Ohio Fuel Gas Co.*, 127 Ohio St. 469, 189 N.E. 246. Where, from the evidence, reasonable minds may reach different conclusions upon any question of fact, such question of fact is for the jury. The test is not whether the trial judge would set aside a verdict on the weight of the evidence. *Hamden Lodge v. The Ohio Fuel Gas Co.*, supra.

The Court of Appeals relies upon language contained in *Detroit, Toledo & Ironton R.R. v. Rohrs,* 114 Ohio St. 493, 503, reading as follows:

> "Where the trial court is requested to charge that it is the duty of a traveler upon the highway to look and listen before going upon a steam railway grade crossing, it is error for the court to refuse to so charge, and in lieu thereof to charge the jury only that the traveler on the highway must exercise ordinary care for his own safety before going upon a steam railroad crossing. The duty is definite, and is that he must look as well as listen, and that he must look from a point and at a time that will make the looking effective to apprise him whether danger is near or not.
>
> "In view of the undisputed evidence in this case as to Rohrs' negligence, the trial court should have granted the motion to direct a verdict for the defendant. *** "

However, the rule of *Rohrs* is not absolute. *Erie R. Co. v. Lade,* 209 F. (2d) 948 (C.A. 6). It should be noted that in *Rohrs,* there were no obstructions to interrupt or block the view of the plaintiff. As the Court there aptly stated, he looked but did not see.

In *North v. Pennsylvania Railroad Company,* 9 Ohio St. (2d) 169, 224 N.E. (2d) 757, the Court, in paragraph 1 of its syllabus, said:

> "1. The driver of a motor vehicle, about to pass over a railroad grade crossing on a public street, must exercise his senses of sight and hearing to discover whether trains are also about to pass over such crossing, and such exercise of the senses must be paid at such time and place as to be effective for the purpose (Syllabus of Boles v. Baltimore & Ohio Rd. Co., 168 Ohio St. 551, 156 N.E. (2d) 735, approved and followed.)"

In *North* as well as all other cases involving railroad crossings, the cases assume that the plaintiff was provided a safe place to stop and to effectively look and listen.

In *Baltimore & Ohio Railroad Co. v. Henery,* 11 O.O. (2d) 352 (U.S.C.A. 6, 1956), the fourth and fifth headnotes read:

"4. The rule that the driver of a vehicle upon a public highway when approaching a grade crossing of a steam locomotive must look and listen at a time and in a place when such looking and listening will be effective requires that such a point exists near the track but far enough away that the automobile driver may stop in safety.

"5. A motorist is not under an unqualified duty to stop before he goes across a railroad track, where his looking and listening does not disclose the presence of a moving train."

The second headnote to *Anderer v. Baltimore & Ohio Railroad Co.*, 20 O.O. (2d) 251 (U.S.C.A. 6, 1962), reads as follows:

"2. A truck driver *who had a place of safety at which he could have stopped and seen down the tracks for four-tenths of a mile,* was contributorily negligent, with respect to a crossing accident, in making less effective observation, although the track converged on the crossing from the driver's right rear, where the construction of the truck and the position of the seat limited the driver's view." (Emphasis added.)

In *Green v. Baltimore & Ohio Railroad Co.*, 31 O.O. (2d) 131 (U.S.C.A. 6, 1964), the fifth headnote reads as follows:

"5. The driver of an automobile which was struck at a grade crossing by defendant's locomotive was guilty of contributory negligence under Ohio law where the headlight on the engine was burning as the train approached the crossing, *the driver was familiar with the crossing,* the track was straight for about three miles before reaching the crossing, and *there was a place of safety before reaching the track at which the driver could have obtained a clear view* of the tracks and the approaching locomotive." (Emphasis added.)

The second headnote to *Newcomb v. Baltimore & Ohio Railroad Co.*, 34 O.O. (2d) 411 (U.S.C.A. 6, 1965), reads:

"2. A decedent was negligent as a matter of law in driving upon the railroad crossing in front of an approaching train, *which he*

would have seen had he looked and listened effectively while he was in a position of safety." (Emphasis added.)

It is submitted that under the circumstances of the case at bar, it cannot be assumed that the petitioner had a safe place to stop and to effectively look and listen. In fact, the petitioner was not afforded such a place of safety.

Certainly, the occurrence itself cannot give rise to an inference of contributory negligence. This basic and honored tenet of the law is expressed in the *New York Central Railroad Company v. Delich*, 252 F. (2d) 522, 15 O.O. (2d) 346 (U.S.C.A. 6, 1958), where the third and fifth headnotes of the case read as follows:

"3. Negligence is never presumed, and presumption that each party in an action based on negligence was in exercise of ordinary care prevails, until rebutted by evidence to the contrary."

* * *

"5. In action for death of tractor driver in railroad crossing *accident, where three railroad tracks crossed highway and decedent* was compelled not only to watch for trains and approaching traffic but to keep his tractor trailer from dangerous edge of a narrow road, an *error of judgment as to order in which decedent should look down the track from which the train approached was not contributory negligence as a matter of law."* (Emphasis added.)

As pointed out in the statement of facts, the petitioner is the victim of retrograde amnesia and recalls none of the events of June 7, 1965. It would appear obvious that this should place him in the position equivalent to one who is deceased, *viz.*, he is entitled to all inferences that he did exercise prudence and ordinary care in the operation of the truck.

The record shows that the petitioner, in fact, fully complied with applicable Ohio law in stopping, looking and listening. He stopped as close to the ultimate point of danger to look and listen as might be expected of any reasonably prudent man, *i.e.*, with the front of the truck only two and one-half to three feet away from the point where the

overhang of the passing train would collide. At that point, the petitioner simply was not able to see the train in that it was at that time 800 feet away and, therefore, not discernible to him. The limitation of the petitioner's vision was caused by the respondent's negligence in storing seventeen freight cars needing repair on the storage track. As a result of the respondent's conduct, the petitioner was not afforded a "safe place" to stop, look and listen.

The decision of the Court of Appeals affirming the judgment of the trial court that the petitioner was guilty of contributory negligence as a matter of law, where the evidence shows that the petitioner stopped, looked and listened before going upon the three track railroad grade crossing, but was unable to hear or see the respondent's train approaching the crossing, the crossing at an acute angle of 29° because of empty freight cars parked for repairs at a point 390 feet east of the centerline of the highway, and because no horn or whistle was sounded, is in conflict with governing Ohio law.

The Fifth Amendment to the Constitution of the United States guarantees that no person shall be deprived of life, liberty, or property without due process of law. To the extent that petitioner is permanently paralyzed from the fourth thoracic vertebra down and will be confined to a wheelchair for the remainder of his natural life without compensation as a result of the trial judge's direction of a verdict for the respondent as a matter of law. Regardless of whether it could be found, after admission of the respondent's evidence, that petitioner was guilty of contributory negligence, it is clear that on the basis of the petitioner's evidence, which is all the trial court had before it, there is no basis for a determination that reasonable minds can reach only one conclusion, *viz.*, that petitioner is guilty of contributory negligence. Without consideration of the respondent's evidence, petitioner has been denied the guarantee of due process. The determination that the petitioner was guilty of contributory negligence as a matter of law on a motion for directed verdict is not only contrary to the applicable Ohio law but also deprives petitioner of the right to have his entitlement to compensation determined factually on the basis of all the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

No. 18652

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

William T. McCluskey, Jr., *Plaintiff-Appellant,* **v. Norfolk and Western Railway Company** *Defendant-Appellee.*	**Appeal** from the United States District Court for the Northern District of Ohio, Western Division.

Decided February 21, 1969.

Before: **Edwards, Celebrezze** and **Peck**, Circuit Judges.

Per Curiam. This is a grade crossing accident case in Ohio wherein a 21-year-old driver of a soft drink truck was seriously injured, suffering retrograde amnesia, among other injuries, as a result of his truck being struck by defendant's railroad train.

Plaintiff appeals from an order granting defendant's motion to dismiss at the close of plaintiff's proofs in this nonjury case. The order entered by a United States District Judge in the Northern District of Ohio, Western Division, found "that plaintiff has been guilty of contributory negligence, which negligence proximately contributed to the injuries complained of and therefore finds said motion for directed verdict to be well taken and it is therefore, ORDERED that the complaint herein be, and it hereby is dismissed with prejudice at plaintiff's costs."

Appellant, however, points out that for such a motion to be granted under Ohio law, the evidence must be construed most strongly in plaintiff's favor. *Wilkeson v. Erskine & Sons, Inc.*, 145 Ohio St. 218 (1945). Among other factors, appellant points to testimony from a number of neighborhood witnesses that they did not hear the train blow its whistle, as required by Ohio law. **Ohio Rev. Code Sec. 4955.-32.** Appellant argues that this failure (if found by the jury) constitutes negligence which was a proximate cause of the accident. The District Judge in deciding this case, however, assumed that defendant was indeed guilty of proximate negligence in failing to blow the whistle.

Appellant also claims that his conduct in the seconds just prior to this accident was that of a reasonable man. On this issue, the facts established without dispute at the trial include the following: 1) The events involved herein occurred on a bright, clear afternoon in early June. 2) The intersection in question was at an acute angle of 29° between the highway and the railroad track so that appellant would have had to look back over his right shoulder to see the approaching train. 3) The crossing was a three-track crossing, and on the track closest to appellant, some freight cars were parked for repairs at a point 390 feet east of the centerline of the highway. Defendant's train came from the east, traveling on the center or through track. The diesel engine was higher than the freight cars on the repair track. 4) The truck which appellant was driving had two characteristics which added to the hazards of the crossing. First, while appellant was behind the wheel of the truck, he could not see more than 300 feet down the track because his view to the rear was obscured by the truck cab itself. Secondly, he was driving a truck loaded with 200 cases of soft drinks which required him to pass over the rough crossing at this location in the creeper gear at approximately a mile and a half per hour. 5) Plaintiff testified that he had no memory of the events during this accident and that amnesia had wiped out his recall of events for some time prior to it. Appellant's counsel claims in this regard a presumption of freedom from contributory negligence on behalf of his client. 6) Plaintiff called three members of the train crew as witnesses. They testified that

they saw appellant's truck stop before crossing the through track, "drift back" a few feet and then start forward directly in the path of their train. Their testimony also established without dispute in this record that they could see appellant's truck from the engine cab when the engine was 1,500 feet from the crossing, and that the searchlight on the diesel engine was lit.

With these facts before him, the District Judge held:

> "The Supreme Court has laid down the absolute rule that if a man can't see and goes ahead anyway, he goes ahead at his own peril. I think that that is the situation with which we are faced here."

In this case federal court jurisdiction is based solely upon diversity of citizenship, and the governing law is that of Ohio where the accident occurred. The Supreme Court the District Judge referred to was the Supreme Court of Ohio, which has consistently maintained a heavy burden upon plaintiffs in grade crossing cases.

In the leading grade crossing case, the Ohio Supreme Court said:

> "Where the trial court is requested to charge that it is the duty of a traveler upon the highway to look and listen before going upon a steam railway grade crossing, it is error for the court to refuse to so charge, and in lieu thereof to charge the jury only that the traveler on the highway must exercise ordinary care for his own safety before going upon a steam railroad crossing. The duty is definite, and is that he must look as well as listen, and that he must look from a point and at a time that will make the looking effective to apprise him whether danger is near or not.
>
> "In view of the undisputed evidence in this case as to Rohrs' negligence, the trial court should have granted the motion to direct a verdict for the defendant." *Detroit, Toledo & Ironton R.R. v. Rohrs,* 114 Ohio St. 493, 503 (1926).

This court has previously followed this Ohio law in *The Detroit, Toledo & Ironton R.R. v. Yeley*, 165 F.2d 375 (6th Cir. 1947); *Newcomb v. Baltimore & Ohio R.R.*, 352 F.2d 406 (6th Cir. 1965).

We cannot hold that the District Judge misconstrued the applicable Ohio law in this case.

The judgment is affirmed.

Appendix B

No. 18,652

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM T. McCLUSKEY, JR.,
Plaintiff-Appellant,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant-Appellee.

ORDER

Before: **EDWARDS**, **CELEBREZZE** and **PECK**, Circuit Judges

This court having received and considered a petition for rehearing in the above-styled case, the same is hereby denied.

Entered by order of the court

/s/ Carl W. Reuss

Appendix C

ORDER

This cause having come on for trial before the Court without a jury, beginning on the 29th day of January, 1968, and the plaintiff having rested on the 5th day of February, 1968, defendant moved the Court for an order directing a verdict in its favor and final judgment upon the grounds that plaintiff's evidence was insufficient as a matter of law to establish a question of fact as to the negligence of the defendant or wanton misconduct on the part of said defendant and upon the further ground that plaintiff's evidence affirmatively established defendant to be guilty of contributory negligence as a matter of law; upon due consideration whereof the Court finds said motion not well taken as it relates to the negligence of the defendant but further finds the evidence insufficient to pose a question of fact as to the alleged wanton misconduct of defendant and further finds, as a matter of law, that plaintiff has been guilty of contributory negligence, which negligence proximately contributed to the injuries complained of and therefore finds said motion for directed verdict to be well taken and it is therefore,

ORDERED that the complaint herein be, and it hereby is dismissed with prejudice at plaintiff's costs. Judgment for defendant. Exceptions to plaintiff, and it is

FURTHER ORDERED that the previous order of this Court dated February 7, 1968, be and the same is hereby vacated for the reason that said order was incomplete.

/s/ Don J. Young
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 256

WILLIAM T. McCLUSKEY, JR.,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.
No. 1544.

WILLIAM T. McCLUSKEY, JR.,
Petitioner,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION.

COUNTER STATEMENT OF THE CASE.*

Petitioner omitted the following undisputed facts: (1) the crossing was located in flat, sparsely-populated, open country; (2) the day in question was bright and clear; (3) the physical features of the crossing, and surrounding area, including the bad order cars on the storage track, had remained unchanged for years; (4) petitioner was familiar with the crossing, having passed over it in his employer's truck on many occasions; (5) petitioner was familiar with the physical features of his truck; (6) the diesel locomotive headlight was burning brightly as it approached the crossing.

Additionally, it is undisputed that petitioner stopped momentarily at a point of safety before proceeding onto the main track. This point of safety was not two and a half feet from the overhang of the diesel as suggested in the last paragraph on page 8 of petitioner's brief. Rather, it was at least four feet from the diesel overhang, a dis-

* This case is reported in 408 F. 2d 1025 (1969).

tance which petitioner requested his expert witness, a civil engineer, to assume, in order to calculate how far petitioner could see down the tracks immediately prior to the accident.

REASONS FOR DENYING THE WRIT.

The well-established Ohio law is that a highway traveler about to proceed over a railroad grade crossing must look and listen for approaching trains at a point and time where looking and listening are effective. *The Detroit, Toledo & Ironton Rd. Co. v. Rohrs,* 114 Ohio St. 493, 151 N.E. 714 (1926). The Supreme Court of Ohio time and again has approved and followed this strict mandate, most recently in *North v. Pennsylvania Railroad Company,* 9 Ohio St. 2d 169, 224 N.E. 2d 757 (1967), where the court held that a summary judgment, prior to trial, should have been granted in favor of the railroad on the issue of liability.

It is undisputed that the petitioner herein, from a point of safety, had a view of 750 feet down the tracks, and yet, petitioner states that he began to proceed forward from that point of safety and onto the main track when the diesel was 600 feet away. See the first incomplete paragraph on page 5 of petitioner's brief. Had the plaintiff looked, he must have seen; if he did not look he cannot recover. *The Detroit, Toledo & Ironton Rd. Co. v. Rohrs,* 114 Ohio St. 493, 503, 151 N.E. 714, 717 (1926).

The facts of this case place it squarely within the holdings of *Newcomb v. Baltimore & Ohio Railroad Co.,* 352 F. 2d 406 (6th Cir. 1965), *Detroit T. & I. R. Co. v. Yeley,* 165 F. 2d 375 (6th Cir. 1947), and *Baltimore & O. R. Co. v. Joseph,* 112 F. 2d 518 (6th Cir. 1940), *cert. den.,* and *reh. den.,* 312 U.S. 682 (1941), which thoroughly review the applicable Ohio law. These cases can be distinguished

from petitioner's only insofar as their facts are more favorable to the plaintiff highway travelers considered.

Any difficulty which petitioner might have had in seeing down the tracks was caused by the physical makeup of his own truck of which he was well aware and over which respondent had no control. *Price v. New York Central System,* 91 F. Supp. 898 (N.D. Ohio 1950), *Anderer v. The Baltimore and Ohio Railroad Company,* 300 F. 2d 14 (6th Cir. 1962), *Norfolk and Western Railway Company v. Hagy,* 201 Va. 183, 110 S. E. 2d 177 (1959), *cert. den.,* 361 U.S. 966 (1960).

All of the foregoing cited cases held that the plaintiffs therein had failed to sustain the burden of proof and therefore were not entitled to have their causes submitted to the jury.

Petitioner's questions and argument do not demonstrate that the United States Court of Appeals for the Sixth Circuit decided an important state question in a way in conflict with applicable state law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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